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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

AMERICAN MEAT INSTITUTE et al., Plaintiffs and Respondents, v. WHITNEY R. LEEMAN, Defendant and Appellant.	D047115 (Super. Ct. No. GIN044220)

APPEAL from an order of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed.

Whitney R. Leeman appeals the trial court's denial of her special motion to strike brought pursuant to Code of Civil Procedure section 425.16. In her motion, Leeman argues that the declaratory relief lawsuit filed against her by American Meat Institute and National Meat Association (the Trade Associations) was a strategic lawsuit against public participation (SLAPP) in that it was filed in response to her service of notices on the Trade Associations' members alleging that they sold meat containing cancer-causing

chemicals and reproductive toxins without giving the warning required by Health and Safety Code section 25249 et seq.

As we will explain, we conclude that the Trade Associations' declaratory relief lawsuit did not arise from the notices served by Leeman and therefore was not subject to a special motion to strike as a SLAPP. Accordingly, we affirm the trial court's order.

I

BACKGROUND

A

Proposition 65

The California Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249 et seq., commonly known as Proposition 65, was passed as a ballot initiative in 1986. Proposition 65 requires the state to develop and maintain a list of chemicals "known to the state to cause cancer or reproductive toxicity." (Health & Saf. Code, § 25249.8, subd. (a).) It also requires that businesses provide warnings before consumers are exposed to such chemicals. Specifically, Proposition 65 states that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual[,]" except as otherwise provided by the statute. (Health & Saf. Code, § 25249.6.) As relevant here, a statutory exception to the Proposition 65 warning requirement arises when "federal law governs warning in a manner that preempts state authority." (Health & Saf. Code, § 25249.10, subd. (a).)

A private citizen may bring an action to enforce Proposition 65 provided that (1) at least 60 days before filing a lawsuit the citizen gives notice to the alleged violator, the Attorney General, district attorneys and city attorneys in the jurisdiction where the violation occurred; and (2) no public official has already commenced prosecution of the same violation. (Health & Saf. Code, § 25249.7, subd. (d)(1).)

Among the chemicals identified by the state as carcinogens pursuant to Proposition 65 are polychlorinated-dibenzo-p-dioxins (dioxins) and polychlorinated biphenyls (PCBs). (Cal. Code Regs., tit. 22, § 12000.) PCBs are also identified as reproductive toxicants. (*Ibid*.)

B

Leeman's Service of Proposition 65 Notices of Violation

The Trade Associations represent packers and processors of meat. In November 2004 Leeman sent notices to eight meat processors and retailers, including six members of the Trade Associations, as well as to the Attorney General, the district attorneys for each of California's 58 counties and certain city attorneys (the Notices). The Notices were titled "60-day Notice of Violation," and specified that they were sent in compliance with the portion of Proposition 65 requiring a 60-day notice before the filing of a citizen suit. In the Notices, Leeman identified dioxin as a carcinogen and PCB as a carcinogen and reproductive toxin, and she stated that the companies at issue were selling either ground beef or beef liver products containing PCBs and dioxins. Leeman alleged in the Notices that "[a]s a result of the sales of these products, exposures to the listed chemicals

have been occurring without clear and reasonable warnings as required by Proposition 65."

After their members received the Notices, the Trade Associations negotiated with Leeman on behalf of their members. Leeman agreed that she would wait several months longer than the required 60 days before filing a citizen suit. The delay would allow more time to explore a potential resolution and allow the Attorney General's Office time to more fully assess the matter.

C

The Trade Associations' Complaint Seeking Declaratory Relief Concerning the Federal Meat Inspection Act's Preemption of Proposition 65's Warning Requirements as to Meat

On the day that the extended waiting period expired, the Trade Associations filed a declaratory relief action against Leeman (the complaint). The complaint seeks declaratory relief on behalf of all of the Trade Associations' members that, "as applied to meat and meat products, the warning requirement of [Proposition 65] is preempted by the Federal Meat Inspection Act [(21 U.S.C. § 601 et seq. (the FMIA))] and its implementing regulations."

As the complaint explained, the FMIA created a federal system for the inspection, labeling and packaging of meat, with the United States Department of Agriculture (USDA) as the agency authorized to set labeling standards and ingredient requirements. (21 U.S.C. §§ 601(a), 607.) The FMIA was enacted to ensure "that meat and meat food products . . . are wholesome, not adulterated, and properly marked, labeled, and packaged." (21 U.S.C. § 602.) A party responsible for selling meat with false or

misleading labeling may be subject to civil or criminal penalties under the FMIA. (21 U.S.C. § 676.) The FMIA contains a preemption clause stating that "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirement under [the relevant portion of the FMIA]." (21 U.S.C. § 678.)

Relying on the FMIA's preemption clause, the complaint alleged that Proposition 65 is expressly preempted by the FMIA with respect to meat labeling requirements. The complaint also alleged that Proposition 65 was impliedly preempted by the FMIA because (1) it was not possible to simultaneously comply with both Proposition 65 and the FMIA, and (2) the application of Proposition 65 would frustrate Congress's objective in enacting the FMIA.

By filing the complaint, the Trade Associations sought a declaration regarding whether the FMIA preempted Proposition 65's warning requirement so that their members "may establish certainty as to their legal obligations and conduct business without subjecting themselves to potential liability for violation of Proposition 65." The complaint explained that "absent a judicial declaration that the Proposition 65 warning requirement is preempted and unenforceable as to meat, [the Trade Associations'] members are forced to choose between compliance with the FMIA's labeling requirements or the different and conflicting Proposition 65 requirement, thereby risking liability under one statutory scheme or the other."

As exhibits to their complaint, the Trade Associations attached letters sent from USDA officials to California officials which stated the USDA's view that the FMIA preempts Proposition 65's warning requirement with respect to the sale of meat, and a letter stating that the USDA would consider such a warning to be misleading as applied to meat that was USDA inspected and approved for sale.

D

Leeman's Special Motion to Strike

In response to the complaint, Leeman filed a special motion to strike under Code of Civil Procedure section 425.16 (Section 425.16). Section 425.16 sets out the procedure for filing a special motion to strike certain lawsuits that are "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a), added by Stats. 1992, ch. 726, § 2, p. 3523.) Because Section 425.16 allows for the early dismissal of SLAPP suits, it is often called the "'anti-SLAPP' statute." (*Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, 197 (*Kibler*).)

"'Section 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute — i.e., that arises from protected speech or petitioning *and* lacks even minimal merit — is a SLAPP, subject to being

stricken under the statute.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278-279 (*Soukup*).)[1] On the first step, the party filing the anti-SLAPP motion (i.e., the defendant) has the burden of establishing that the plaintiff's claim arose from protected activity. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) On the second step, the party defending against the motion (i.e., the plaintiff) has the burden to establish a probability of prevailing on the claim. (*Ibid*.)

In her anti-SLAPP motion, Leeman argued that because the complaint was filed in response to her issuance of the Notices, the complaint arose from the exercise of her right to petition with respect to a public issue, and was thus a SLAPP.

The Trade Associations opposed the motion. They argued Leeman could not establish that the complaint arose from protected activity because the complaint was "not based on [the Notices], but rather on the underlying controversy as to whether the FMIA preempts Proposition 65." They further contended that they have a probability of

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1 Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." "[I]n order to establish the requisite probability of prevailing [citation], the plaintiff need only have '"stated and substantiated a legally sufficient claim."' [Citations.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 (*Navellier*).)

prevailing on the preemption issue, and thus would meet their burden to defeat the second requirement for an anti-SLAPP motion.[2]

The trial court denied the special motion to strike. Citing our Supreme Court's decision in *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 (*Cotati*), the trial court ruled that the complaint was "not based on the service of any notice and rather was simply triggered by the service of same" and thus did not fulfill the first requirement of an anti-SLAPP motion, i.e., that the action *arise from* protected activity.[3] Accordingly, the trial court denied the special motion to strike without considering whether the Trade Associations demonstrated a probability of prevailing on their request for a declaration that the FMIA preempted the Proposition 65 warning requirement as to meat.

Leeman appeals. (See Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(13) [allowing immediate appeal of an order denying a special motion to strike].)

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2 The Attorney General filed an amicus curiae brief in the trial court addressing only the second part of the anti-SLAAP analysis: whether there was a probability that plaintiffs would prevail on their claim. The Attorney General argued that the FMIA did not preempt Proposition 65's warning requirement as to meat products.

3 Specifically, the trial court ruled as follows: "The [c]ourt finds that the complaint does not arise from [Leeman's] free speech or petition activity. [¶] As the Court held in [*Cotati*, *supra*, 29 Cal.4th 69], because the constitutionality of the ordinance and not the park owner's related litigation was the controversy underlying the City's action, the action did not arise from the owner's lawsuit and thus an anti-SLAPP motion was improper. [¶] *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 [(*Equilon*)] is distinguishable. Since the basis of Equilon's lawsuit was the service of the notice, the appellate court concluded that the Equilon lawsuit was barred. Here, [the Trade Associations'] action is not based on the service of any notice and rather was simply triggered by the service of same. As the Court in *Cotati* also stated: '[T]hat a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such.' "

II

DISCUSSION

A

Standard of Review

"'Review of an order granting or denying a motion to strike under [S]ection 425.16 is de novo.'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

B

The Complaint Did Not Arise from Protected Activity

The first inquiry in our anti-SLAPP analysis, and the only issue reached by the trial court, is whether Leeman "'has made a threshold showing that the challenged cause of action is one arising from protected activity.'" (*Soukup, supra*, 39 Cal.4th at p. 278.)

Leeman argues that because the complaint was filed in response to her service of the Notices, it arises from her exercise of the constitutional right of petition or free speech in connection with a public issue. (§ 425.16, subd. (b)(1).) The resolution of this issue comprises two distinct parts. First, we must determine whether the service of the Notices constitutes an exercise of the constitutional right of petition or free speech in connection with a public issue and thus is *protected activity* under the anti-SLAPP statute.[4] Second, we must determine whether the complaint *arises from* any such protected activity.

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4 "Subdivision (e) of [S]ection 425.16 defines the phrase '"act in furtherance of a person's right of petition or free speech . . . in connection with a public issue"' to include: '(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review

There is no dispute regarding the first issue. Our Supreme Court has established that "the filing of Proposition 65 intent-to-sue notices" is "activity in furtherance of . . . constitutional rights of speech or petition." (*Equilon, supra*, 29 Cal.4th at p. 67.) Thus Leeman's service of the Notices was protected activity.

The second issue, however, requires closer analysis. In considering whether the complaint *arises from* Leeman's filing of the Notices we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

1. *Cotati Provides the Applicable Analytical Framework*

As did the trial court, we conclude that our Supreme Court's decision in *Cotati, supra*, 29 Cal.4th 69, 74, provides the applicable analytical framework for determining whether, based on the record before us, the Trade Associations' declaratory relief action "arises from" the Notices served by Leeman.

To apply *Cotati* here, we first closely review its facts and holding. In *Cotati*, owners of mobilehome parks brought a declaratory relief action against the city in federal court, seeking a declaration that the city's rent control ordinance constituted an

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by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.' . . . A defendant who invokes either subparagraph (1) or subparagraph (2) of subdivision (e) of [S]ection 425.16 . . . need not 'separately demonstrate that the statement concerned an issue of public significance.'" (*Kibler, supra,* 39 Cal.4th at p. 198, italics omitted.)

unconstitutional taking. In response, the city filed suit against the mobilehome park owners in state court, requesting a declaration that the rent control ordinance was constitutional, valid, and enforceable. (*Cotati*, *supra*, 29 Cal.4th at p. 72.) The city "concede[d] that its purpose in filing the state court action was to gain a more favorable forum in which to litigate the constitutionality of its mobilehome park rent stabilization ordinance," and that "in filing the state court action it intended subsequently to seek to persuade the federal court to abstain from hearing [the mobilehome park owners'] suit." (*Id*. at p. 73.)

The Supreme Court rejected the argument that the "filing of [the] state court action arose from [the mobilehome park owners'] filing of their earlier federal action and, therefore, fell within the ambit of the anti-SLAPP statute." (*Cotati*, *supra*, 29 Cal.4th at pp. 73, 76-80.) The Supreme Court explained that although "[i]t is indisputably true . . . that [the c]ity's action was filed shortly after [the mobilehome park owners] filed their claim in federal court," "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*Id*. at pp. 76-77.) As established by *Cotati*, "[i]n the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*Id.* at p. 78.) Although "a cause of action arguably may have been *triggered* by protected activity," that does not necessarily mean "that it is one *arising from* such [activity]." (*Ibid*., italics added.)

In *Cotati*, because the "fundamental basis" for the city's request for relief was the "*underlying controversy* respecting [the rental control] ordinance," the city's lawsuit

"therefore was not one *arising from* [the mobilehome park owners'] federal suit" and "was not subject to a special motion to strike." (*Cotati*, *supra*, 29 Cal.4th at p. 80, italics added.) The Supreme Court stressed that "[t]o construe 'arising from' in [S]ection 425.16, subdivision (b)(1) as meaning '*in response to*,' . . . would in effect render all cross-actions potential SLAPPs," which was "an absurd result." (*Id*. at p. 77.)

Based on the principle established in *Cotati*, "a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [I]t is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies . . . ." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188, citations omitted.)

Cotati's reasoning applies here as well. Although *Cotati* dealt with litigation already *filed* by the defendant, and this case deals with litigation *threatened* by Leeman, the principle is the same. Both here, and in *Cotati*, the act of filing or threatening litigation, although protected activity, was merely the *trigger* for the ensuing declaratory relief action. Neither here, nor in *Cotati*, did the ensuing declaratory relief action challenge the protected activity itself. Instead, the lawsuits here and in *Cotati* raised an *underlying issue* that was separate from the protected activity itself.

The gravamen of the complaint is not a challenge to the Notices, but rather a dispute over the preemptive effect of the FMIA on Proposition 65. As the Trade Associations explain, the Notices signaled that Leeman intended to file a complaint seeking penalties for noncompliance with Proposition 65 with respect to meat labeling,

while the USDA, on the other hand, had indicated that it would not permit Proposition 65 warnings on meat. Because of Leeman's Notices, which conflicted with the USDA's position, the Trade Associations' members were confronted with the choice of either complying with the warning requirements of Proposition 65 as advanced by Leeman or complying with the USDA's meat labeling rules. The Trade Associations filed suit on behalf of their members to resolve that dilemma. The Notices merely *identified* the dispute between Leeman and the Trade Associations' members. Under these circumstances, the Trade Associations' complaint cannot be construed as *arising from* protected activity, but rather only *triggered* by it.[5]

Accordingly, Leeman's anti-SLAPP motion fails because the complaint did not arise from the protected activity of serving the Notices, just as the complaint in *Cotati* did not arise from the declaratory relief action filed by the mobilehome park owners.

2. *Equilon Does Not Apply*

Relying on a decision that our Supreme Court issued on the same day as *Cotati*, Leeman argues that *Equilon*, *supra*, 29 Cal.4th 53, supports her anti-SLAPP motion

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[5] The Trade Associations' complaint does not seek to enjoin Leeman from filing suit. Arguably, however, as in *Cotati*, the complaint was filed as a litigation tactic in an effort to select the forum where Leeman will eventually have to adjudicate any lawsuit she files. Such a motivation does not mean, however, that the suit *arises from* Leeman's threatened litigation. "[A] claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic." (*Cotati*, *supra*, 29 Cal.4th at p. 78.) A court should not "focus on . . . litigation tactics, rather than on the substance of [the] lawsuit" in determining whether "an alleged SLAPP *arise*[*s*] *from* protected speech or petitioning." (*Ibid*.)

because it establishes that the Trade Associations' complaint arose from protected activity. We disagree.

At issue in *Equilon* was a Proposition 65 notice issued by a citizen's group to an oil company, alleging a discharge of pollutants. The oil company filed a lawsuit aimed directly at the efficacy of the Proposition 65 notice. Specifically, the oil company sought (1) "a declaration that the notice failed to comply with the California Code of Regulations" and (2) an injunction barring the defendant from filing a Proposition 65 enforcement action. (*Equilon, supra,* 29 Cal.4th at p. 57.) Because the lawsuit *challenged the notice* and *sought to enjoin a future lawsuit*, our Supreme Court determined that the lawsuit arose from protected activity. The lawsuit was "expressly based . . . on [the defendant's] activity in furtherance of its petition rights" (*id*. at pp. 67-68), and the "injunctive relief [the oil company sought] would restrict [the citizen group's] exercise of petition rights." (*Id*. at p. 67, fn. 4.)

In this case, unlike *Equilon*, the complaint does not challenge the Notices; nor does it seek to enjoin Leeman from filing a Proposition 65 citizen suit. On the contrary, the Trade Associations simply seek resolution of a question that will help their members determine how to respond to Leeman's Notices and any eventual lawsuit filed by Leeman: Does the FMIA preempt Proposition 65's warning requirements as applied to meat? Here, unlike *Equilon*, the complaint did not arise from the Notices. Instead, as in

Cotati, the complaint was merely *triggered* by the Notices. Thus, *Cotati*, rather than *Equilon*, is the analogous authority.[6]

In its amicus curiae brief on appeal, the Attorney General argues that the complaint necessarily arose from the Notices because, without the Notices, there would be no actual controversy to support the Trade Associations' action for declaratory relief. As we will explain, we reject this argument, which is not advanced by Leeman in her own briefing.

At the heart of the Attorney General's argument is an implicit assumption that whenever a plaintiff files a declaratory relief lawsuit to resolve a dispute that *has matured into a actual controversy* by virtue of protected activity, the lawsuit necessarily *arises from* the protected activity as that term is used in the anti-SLAPP statute. This assumption finds no support in the case law. Protected activity, such as the filing of a lawsuit or the filing of an official notice, will often *bring to light* a controversy that exists between two parties, ripening it into an actual controversy. However, as established in

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6 We note as well that Leeman interprets *Cotati*, *supra*, 29 Cal. 4th 69; *Equilon*, *supra*, 29 Cal. 4th 53; and a third case decided on the same day, *Navellier*, *supra*, 29 Cal.4th 82, to establish two separate and independent bases for determining whether a lawsuit arises from protected activity. First, Leeman claims that a cause of action arises from protected activity whenever the cause of action "*expressly alleges*" the protected activity. Second, Leeman claims that a cause of action arises from protected activity when the protected activity is a "'but-for'" cause of the lawsuit. We have reviewed *Equilon*, *Cotati* and *Navellier*, and we do not discern either of these principles as having been established therein. As we have explained, the principles guiding our analysis are set forth in *Cotati*, which explains that a cause of action arises from a protected activity only if the cause of action "itself was *based on* an act in furtherance of the defendant's right of petition or free speech," and not if the cause of action was merely "in response to" the protected activity. (*Cotati*, at p. 78.)

Cotati and discussed above, a subsequent lawsuit filed to resolve that controversy does not necessarily *arise from* the protected activity that brought the controversy to light, but rather the lawsuit may have only been *triggered* by the protected activity. (*Cotati, supra*, 29 Cal.4th at p. 78.) Here, as in *Cotati*, the underlying issue presented by the declaratory relief action does not in any way challenge Leeman's protected activity or seek to penalize Leeman because of her protected activity. Instead, the complaint, which seeks resolution of the preemption issue, was merely *triggered* by the Notices.[7]

We therefore conclude that the first prerequisite for an anti-SLAPP motion is not present in this case because Leeman has failed to establish that the complaint arose from protected activity. Having determined that the complaint does not arise from protected activity, we need "not reach the anti-SLAPP statute's secondary question" as to "whether

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[7] As indicated by their response to the Attorney General's amicus curiae brief, the Trade Associations also understand the Attorney General to be arguing that the declaratory relief action is not an actual, ripe controversy and thus not justiciable, even though Leeman served the Notices and thereby indicated her intent to sue. To address that perceived argument, the Trade Associations have submitted a request for judicial notice, consisting, among other things, of evidence that Leeman has filed numerous citizen suits under Proposition 65. They argue that this evidence shows the Notices represent an actual threat of litigation and that the dispute with Leeman is accordingly justiciable. An independent argument that the declaratory relief action fails because it is not justiciable goes beyond the issues presented by the anti-SLAPP motion, which was the only motion presented to the trial court and the only motion addressed by the parties on appeal. We decline to address the justiciability issue in response to an argument that is raised on appeal solely by an amicus curiae and that was not raised at all in the trial court. (See *Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 73-74 ["we decline to address these new issues raised only by the amicus curiae briefs"].) We also deny the Trade Associations' request to take judicial notice, as it is made in connection with the justiciability issue, which we do not address. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials that are not "necessary, helpful, or relevant"].)

. . . 'there is a probability that [plaintiffs] will prevail on the claim'" (*Cotati*, *supra*, 29 Cal.4th at pp. 80-81), and we thus do not address the preemption issue.

DISPOSITION

The order appealed from is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.